Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

—v.—

FRANK M. DYSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JULY 16, 1973
CERTIORARI GRANTED APRIL 22, 1974

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Dates of Relevant Proceedings in Lower Courts

1. Petitioners' Complaint filed in United States District Court for the Northern District of Texas, March 27, 1972.
2. Petitioners' Argument and Authorities in Support of Complaint filed, March 27, 1972.
3. Petitioners' Three Requests for Admissions filed, March 27, 1972.
4. Petitioners' Request for Production of Documents Pursuant to Rule 34, FRCP filed, March 27, 1972.
5. Respondents' Motion to Dismiss filed, April 18, 1972.
6. Order Denying Respondents' Motion to Dismiss filed, May 1, 1972.
7. Respondents' Answer filed, May 11, 1972.
8. Responses of N. Alex Bickley and Hugh Jones to Petitioners' Requests for Admission filed, May 15, 1972.
9. Answer of Frank M. Dyson to Respondents' Answer to Requests for Admission filed, May 15, 1972.
10. Respondents' Trial Brief filed, May 22, 1972.
11. Petitioners' Trial Memorandum filed, May 22, 1972.
12. Petitioners' Motion for Summary Judgment, with Supporting Affidavit of Robert D. Love filed, July 17, 1972.
13. Respondents' Opposition to Petitioners' Motion for Summary Judgment filed, July 31, 1972.
14. Petitioners' Supplementary Request for Admissions and Interrogatories filed, November 10, 1972.

15. Respondents' Answers to Supplementary Request for Admissions and Interrogatories filed, December 15, 1972.

16. Opinion and Order of District Court Dismissing Petitioners' Complaint filed, December 13, 1972.

17. Petitioners' Notice of Appeal to Fifth Circuit filed, December 13, 1972.

18. Order of Fifth Circuit Summarily Affirming Dismissal of Petitioners' Complaint filed, April 16, 1973.

19. Petition for Certiorari Granted, April 22, 1974.

Petitioners' Complaint in the Northern District of Texas

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
(DALLAS DIVISION)

Civil Action No. CA-3-5702 D

TOM E. ELLIS and ROBERT D. LOVE,

Plaintiffs,

—v.—

FRANK M. DYSON, individually and in his capacity as Chief of Police of the City of Dallas, Texas; N. ALEX BICKLEY, individually and in his capacity as City Attorney for the City of Dallas, Texas; SCOTT MCDONALD, individually and in his capacity as City Manager for the City of Dallas, Texas; HUGH JONES, individually and in his capacity as Clerk of the Corporation Courts of the City of Dallas, Texas; and WES WISE, individually and in his capacity as Mayor of the City of Dallas, Texas,

Defendants.

Now come TOM E. ELLIS and ROBERT D. LOVE, plaintiffs in the above styled and numbered action, and file this COMPLAINT, for a declaratory judgment and equitable relief, against the defendants herein, and show the Court the following facts:

1.

Plaintiffs invoke the jurisdiction of this court under Section *1983* of Title *42* of the United States Code, and Section 1343(3) and (4) of Title *28* of the United States Code, for redress of their civil rights and liberties; and under Section *2201* of Title *28*, United States Code, and Rule *57* of the Federal Rules of Civil Procedure, for a judgment to declare Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas, as amended by Ordinance Number 12991, unconstitutional and void; and under Section *2202* of Title *28* of United States Code, for further necessary and proper relief as hereafter set out.

The rights, privileges and immunities sought to be redressed are those secured to plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States; they are those rights, privileges and immunities identified in various decisions of the Supreme Court of the United States as "fundamental rights", rights which are so fundamental as to be guaranteed generally by the provisions of the Constitution and the Amendments thereto.

2.

Plaintiffs are, and at all times mentioned herein, were, citizens of the United States and the State of Texas.

3.

The defendants are all citizens of the United States and the State of Texas, and are residents of the City of Dallas, Texas. They may each be reached for service at their offices in the Municipal Buildings of the City of Dallas, Texas. Each defendant is sued herein in both his individual and his official capacity, to wit:

Defendant Frank M. Dyson is Chief of Police of the City of Dallas, Texas, and is made a defendant herein.

Defendant N. Alex Bickley is City Attorney of the City of Dallas, Texas, and is made a defendant herein.

Defendant Scott McDonald is City Manager of the City of Dallas, Texas, and is made a defendant herein.

Defendant Hugh Jones is Clerk of the Corporation Courts of the City of Dallas, Texas, and is made a defendant herein.

Defendant Wes Wise is Mayor of the City of Dallas, Texas, and is made a defendant herein.

Said defendants, at all times pertinent to this COMPLAINT, were serving in said official capacities.

4.

Plaintiffs were arrested on January 18, 1972, at approximately 2 a.m. o'clock, by police officers of the City of Dallas, for an alleged violation of Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, as amended by Ordinance 12991, a copy of which is annexed hereto as Exhibit "A" and made a part hereof for any and all legal purposes. Said arrests were the direct responsibility of defendant Wise, as Mayor; McDonald, as City Manager; and Dyson, as Chief of Police, because the police officers making said arrests and charges were acting under the orders and in the employ of the City of Dallas, and its administrative officers.

5.

Plaintiffs allege and would show this court that Section *31-60* of the Dallas City Code, as amended by Ordinance 12991, is unconstitutional on its face for the following reasons:

(1)

The provision is violative of the Fourteenth Amendment guarantee of Due Process of Law because it is so vague and overly-broad as to provide no discernible standards of conduct. Such a law fails the tests of Due Process because it fails to inform a citizen of what conduct is proscribed. In this case, the ordinance does not even provide standards from which a citizen might reasonably deduce what conduct is or is not violative of the provision.

(2)

The provision is violative of the Fourteenth Amendment guarantee of Equal Protection under law. The ordinance depends, for definition of the offense, upon the moment-to-moment alarm or concern of a policeman on his beat. Such a provision clearly violates the Equal Protection guarantee, for what may alarm or concern one police officer may not alarm or concern another officer only blocks away. Such a law results in patent denial of Equal Protection of Law, and as such, cannot stand.

(3)

The provision is an unreasonable exercise of the police power of the City of Dallas, in that it seeks to proscribe conduct which is clearly outside that which the City of Dallas may seek to control or make illegal. Such harmless conduct as "lagging behind", "ambling about without apparent purpose", or "going from place to place, and back again" is potentially made an offense under the terms of this ordinance. The sweeping scope of this ordinance means that no citizen is safe to carry on any conduct at any place in the City of Dallas, unless he can be telepathic and be assured that his behavior does not alarm or concern a police officer.

(4)

The provision is violative of, and has a chilling effect upon, the free exercise of the First Amendment rights of Freedom of Association and Assembly, as well as Freedom of Speech, and a similar chilling effect upon the fundamental right of Freedom of Movement. Section *31-60* is so sweeping in its potential applicability that any gathering, assembly, speech or other non-criminal behavior may subject the citizens of Dallas to arrest and conviction under its terms.

6.

Plaintiffs, exercising reasonable diligence, attempted to raise the issue of the unconstitutionality of this ordinance in the state courts by filing an application for a Writ of Prohibition with the Texas Court of Criminal Appeals on February 14, 1972. Subsequently, on February 21, 1972, plaintiffs' application was denied without written opinion by the Texas Court of Criminal Appeals.

7.

Subsequently, on February 22, 1972, plaintiffs' cases were called to trial in Corporation Court Number Six of the City of Dallas. At that time, plaintiffs' renewed their objection to the jurisdiction of the court on the grounds that the ordinance which they were charged with violating

was unconstitutional, leaving the court without any jurisdiction to act. Plaintiffs' motions were overruled, whereupon they entered a plea of *nolo contendere,* and were convicted of violating Section *31-60,* of the Dallas City Code. Said conviction was the direct responsibility of Defendant N. Alex Bickley, as City Attorney of the City of Dallas, and as its chief legal officer. Since the arrest of Plaintiffs, a record of the case has been and is being maintained in the offices of the Defendant, Hugh Jones, as Clerk of the Corporation Courts of the City of Dallas. Further, a record of the *arrest* is maintained in the files of the Police Department of the City of Dallas, under the care and control of Defendant Frank Dyson, and said arrest record is made available to any and all police agencies, whether local, state or federal, and may have been forwarded to other agencies or central data centers at his discretion and direction and under his authority.

8.

Plaintiffs would show the court that since an unconstitutional ordinance is no ordinance, and since any offense attempted to be established by an unconstitutional ordinance is not thereby an offense at all, it follows that any court attempting to enforce such an ordinance is acting without jurisdiction and totally *ultra vires.* Nevertheless, the respective actions of the defendants have resulted in a conviction of the Plaintiffs for a violation of an unconstitutional ordinance, and a record being made and maintained of the fact of said arrests and convictions, all of which deny to the Plaintiffs their fundamental rights, privileges and immunities as citizens of America.

RELIEF

Count I

Plaintiffs request this court to enter its judgment declaring that Section *31-60* of the Revised Code of Civil and Criminal Ordinances of the City of Dallas is facially unconstitutional.

Count II

Plaintiffs request this court to enter its judgment declaring their convictions for violation of the aforesaid ordinance to be null and void.

Count III

Plaintiffs request this court to enter its judgment declaring the arrests of the Plaintiffs for violation of said ordinance, as described herein, to be null and void.

Count IV

Plaintiffs request this court to enter an order directing the Defendant, Frank Dyson, to forthwith physically expunge from the records of the Dallas Police Department all references to the arrests of the Plaintiffs on or about January 18, 1972, for violation of Section *31-60* of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

Count V

Plaintiffs request this court to order the Defendant, Frank Dyson, to report to this court the names of any persons or agencies who may have obtained copies of the records of the arrests of the Plaintiffs as described herein,

and that the said Dyson be further ordered to notify any such persons or agencies of the judgment of this court.

COUNT VI

Plaintiffs request this court to order the Defendant, Frank Dyson, to advise the court whether or not the records of the arrests of the Plaintiffs on the aforesaid occasion have been forwarded to the Federal Bureau of Investigation. If, in fact, the records of said arrests have been forwarded to the Federal Bureau of Investigation then, in that event, Plaintiffs further request this court to enter an order directing the said Dyson to forthwith petition the Federal Bureau of Investigation for the return of all of such records.

COUNT VII

Plaintiffs request this court to enter their order directing Defendant, Hugh Jones, to forthwith physically expunge from the records of the Corporation Court of the City of Dallas all references to the convictions of the Plaintiffs on or about February 22, 1972, for violations of the aforesaid ordinance.

COUNT VIII

Plaintiffs request this court to enter its judgment declaring that the Plaintiffs, if asked if they have been arrested or convicted on any employment or financial application, shall be entitled to answer in the negative insofar as the arrests and convictions at issue herein are concerned.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Telephone: 696-2599

EXHIBIT "A"

ORDINANCE No. 12991

An Ordinance amending Chapter 31 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by repealing Section 31-39, Section 31-60, Section 31-61 and Section 31-66, and amending Chapter 32 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by repealing Section 32-4.1 thereof and in lieu thereof enacting a new Section known as Section 31-60; Providing that no person shall loiter in, on or about any public or private place when his presence is accompanied by activity or is under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property in the surrounding area; Defining the term *loiter;* Defining the term *any place;* Defining the term *surrounding area;* Setting forth guidelines to be used in making a determination of probable cause for alarm and concern; Providing for a fine not to exceed $200.00 for any violation hereof; Providing for a savings clause; Declaring an effective date; and Declaring an emergency.

WHEREAS, the City Council is of the opinion that the prevention of crime is in the best interest of the public; and

WHEREAS, the City Council is aware that such prevention of crime may be accompanied through diligent observation by the Peace Officers of the State of all places, both public and private; and

WHEREAS, the City Council recognizes that such observation may cause the Peace Officers of the State to become

aware of many and various activities and circumstances which would allow the Officers probable cause to believe that criminal activity is about to take place; and

WHEREAS, the City Council further recognizes that the mere observation of such activities and circumstances would not, in and of itself, prevent the probable criminal activity, without a right of the Peace Officers of the State to arrest persons involved in such activities and circumstances; and

WHEREAS, the City Council is of the opinion that the only public officials available, both in man power strength and through proper training, to make on the spot determinations of probable ~~cause, are~~ the Peace Officers of the State; and

WHEREAS, the City Council desires to preserve the rights of the individual, guaranteed to him by the Constitution of the United States and by the Constitution of the State of Texas; and

WHEREAS, the City Council considers that the best interest of the public and the individual are to be served by providing guidelines for Law Enforcement Officials which will enable those Officials to make more objective decisions as to whether or not there is probable cause to believe criminal activity is about to result; and

WHEREAS, the City Council is of the opinion that Law Enforcement Officials, using the prepared guidelines, will be able to prevent many probable criminal acts; Now Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 31 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, be and the same is hereby amended by repealing Section 31-39, Section 31-60, Section 31-61, and Section 31-66 thereof, and that Chapter 32 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, be and the same is hereby amended by repealing Section 32-4.1 thereof, and in lieu thereof enacting a new section known as Section 31-60 which shall read as follows:

"SECTION 31-60. *Loitering accompanied by activity or under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property—prohibited.*

It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well-being of persons or for the security of property, in the surrounding area.

For the purposes of this Section, the term *loiter* shall include the following activities: The walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; the idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions.

For the purposes of this Section, the term *any place,* public or private, shall include, but not be limited to,

the following: All places commonly known as being distinctively public, such as public streets, public restrooms, sidewalks, parks, municipal airports, alleys and buildings; all places privately owned but open to the public generally, such as shopping centers, transportation terminals, retail stores, movie theatres, office buildings, and restaurants; and, all places distinctively private, such as homes or private residences and apartment houses.

For the purposes of this Section the term *surrounding area* shall be defined as follows: That area easily and immediately accessible to the person under observation.

Without limitation, the following activities and circumstances may be considered in determining probable cause for alarming concern:

(a) The flight of a person upon the appearance of a Peace Officer or any other person;

(b) Attempted concealment by a person upon the appearance of a Peace Officer or any other person;

(c) The systematic checking by a person of doors, windows, or other means of access to buildings, houses or vehicles;

(d) Repeated activity by a person, continuous or broken, which outwardly manifests no purpose, such as going from one place to another and back with no showing of use for such movement;

(e) Continuous presence by a person in close proximity to any building, house, vehicle or any other

property or to any other person, at any time, when the activity of such person manifests possible unlawful activity, such continuous presence being for an unreasonable period of time under the circumstances then existing;

(f) A change of direction by a person upon the appearance of a Peace Officer in order to avoid meeting or crossing paths with such Officer;

(g) If on private property, the continued refusal of a person to leave such private property when requested to do so by the owner, manager, proprietor, or lessee of such property."

SECTION 2. Any person in violation of this Ordinance shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than $200.00.

SECTION 3. That Chapter 31 and Chapter 32 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, save and except as amended herein, shall remain in full force and effect.

SECTION 4. The fact that Section 31-61 of Chapter 31 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, previously passed by the City Council of the City of Dallas has been declared to be unconstitutional and unenforceable in the Courts of this State, creates an urgency and an emergency in the preservation of the public peace and general welfare and requires that this Ordinance shall take effect immediately from and after its passage and final publication in accordance with the

provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

N. ALEX BICKLEY, City Attorney

ATTEST:
Harold G. Shank
City Secretary

PASSED: July 20, 1970

CORRECTLY ENROLLED July 20, 1970 N. Alex Bickley
City Attorney

Respondents' Answer in the Northern District of Texas

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[CAPTION OMITTED]

DEFENDANTS' ANSWER

To the Honorable Judge of Said Court:

NOW COME the Defendants FRANK M. DYSON, N. ALEX BICKLEY, SCOTT MCDONALD, HUGH JONES and WES WISE, individually and in their official capacities, and file this their Answer and say as follows:

First Defense

I.

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

Second Defense

II.

Plaintiffs' Complaint fails to allege a cause of action or basis for bringing into play the equitable jurisdiction of the Federal Court in the form of a declaratory judgment and mandatory injunction as prayed for by Plaintiffs.

Third Defense

III.

The declaratory judgments and injunctive relief as prayed for herein should not be granted as a matter of course. Such relief is a matter for sound judicial discretion that should be exercised in favor of Defendants for the following reasons:

(1) There are no allegations in Plaintiffs' Complaint that Defendants have acted in bad faith or committed any act of harassment against Plaintiffs.

(2) There are no allegations of irreparable injury or harm.

(3) There are no allegations that Plaintiffs were prosecuted in bad faith. Plaintiffs' allegations show that they entered pleas of Nolo Contendere to the charges presented in the Municipal Court and did not exercise their rights of appeal from such convictions, thereby waiving their right to litigate, in the Texas Appellant Courts, the questions presented in their Complaint.

(4) Plaintiffs were represented by counsel in the Municipal Court proceedings and were fully advised of their right to a trial in said court, and the right to appeal from their pleas of Nolo Contendere.

(5) Plaintiffs' Complaint does not show that Plaintiffs have been threatened with bad faith prosecution in the future. The allegations in said Complaint concerning possible future arrest and conviction of "citizens" are imaginary and speculative.

(6) Plaintiffs, and any other person charged under this ordinance, have an adequate remedy by defending against a single criminal prosecution in the State Court.

Fourth Defense

IV.

This is a proper case for the Court to apply the Doctrine of Comity and the Doctrine of Abstention to Plaintiffs' Complaint and prayer for relief for the reasons stated in Paragraph III above.

Fifth Defense

V.

In answer to Plaintiffs' Complaint, Defendants say as follows:

(1) Defendants admit that Plaintiffs have sought to allege jurisdiction under certain provisions of the law as contained in Paragraph 1 of Plaintiffs' Complaint but deny that Plaintiffs' Complaint is sufficient to support jurisdiction as alleged.

(2) Defendants admit Paragraphs 2 and 3.

(3) Defendants admit the allegations contained in Paragraph 4 except for that portion that alleges said arrests were the *direct* responsibility of Defendants Wise, McDonald and Dyson. Defendants admit that the arresting officers were in the employ of the City of Dallas as peace officers and as such were acting under the laws of the State of Texas, ordinances of the City of Dallas, and the general orders of the Dallas Police Department.

(4) Defendants deny the allegations contained in Paragraph 5, Subsections (1), (2), (3) and (4), of Plaintiffs' Complaint and say that said Ordinance No. 31-60 is constitutional and valid. Defendants specifically deny that said ordinance violates the First or Fourteenth Amendments.

(5) Defendants admit that Plaintiffs filed a writ of prohibition with the Texas Court of Criminal Appeals which was denied as alleged in Paragraph 6. Defendants deny that this was a timely, reasonable or proper manner in which to raise the constitutionality of said ordinance and say that the laws of the State of Texas provide an orderly procedure for appeal of criminal cases which was not followed by Plaintiffs.

(6) Defendants admit the allegations in Paragraph 7 of Plaintiffs' Complaint except Defendants deny that the convictions were the "direct responsibility" of Defendant Bickley. Defendants also deny that Plaintiffs effectively raised the constitutional issue under the State Court practice by pleading Nolo Contendere in the Municipal Court, which is not a court of record, and by failing to pursue their appeals to the County Criminal Court of Appeals, a court of record, where trial de novo would be provided.

(7) Defendants deny the contentions contained in Paragraph 8 of Plaintiffs' Complaint.

(8) Defendants deny that Plaintiffs are entitled to the relef sought in Counts I, II, III, IV, V, VI, VII and VIII of Plaintiffs' Complaint. In connection with Count VII Defendant Dyson says that records of arrests of Plaintiffs have not been forwarded to the Federal Bureau of Investigation.

First Affirmative Defense

VI.

Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas is a constitutional and valid ordinance passed by the City Council of the

City of Dallas based upon the legislative history as contained in the said ordinance, a copy of which is attached to Plaintiffs' Complaint as Exhibit A. The ordinance is a valid exercise of the police powers of a municipality under the laws of the State of Texas and has a legitimate and useful purpose. The ordinance is designed to preserve the rights of individuals and to protect the public from criminal acts.

Second Affirmative Defense

VII.

Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas is not facially unconstitutional and was not enforced in bad faith against Plaintiffs.

Third Affirmative Defense

VIII.

The Texas laws provide an adequate remedy for any person charged with a violation of Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, and Plaintiffs herein have failed to comply with the established procedures for adjudicating the merits of their case in the State Courts and are therefore estopped from attacking the said ordinance and their final conviction thereunder in this Court.

Fourth Affirmative Defense

IX.

Each Defendant herein says that under the allegations of Plaintiffs' Complaint he is not subject to suit and that a

legal cause of action has not been alleged against him either in his individual capacity or official capacity.

WHEREFORE, PREMISES CONSIDERED, Defendants move the Court to dismiss Plaintiffs' Complaint and to exercise its judicial discretion and abstain from hearing said Complaint or in the alternative to deny all relief sought by Plaintiffs herein, and Defendants pray that they recover their costs herein expended.

Respectfully submitted,

N. ALEX BICKLEY,
City Attorney

THOMAS B. THORPE,
Assistant City Attorney

JOSEPH G. WERNER,
Assistant City Attorney

DOUGLAS H. CONNER,
Assistant City Attorney

Attorneys for Defendants
501 Municipal Building
Dallas, Texas 75201
748-9711, Ext. 294

[Certificate of Service omitted in printing]

Requests for Admissions From Respondent Frank M. Dyson

[CAPTION OMITTED]

PLAINTIFFS, Tom E. Ellis and Robert D. Love, request defendant, FRANK M. DYSON, within 45 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial:

That each of the following statements is true:

(a) You are the Chief of the Dallas Police Department.

(b) As Chief of the Dallas Police Department you intend to continue to enforce Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

(c) On January 18, 1972 at approximately 2 o'clock a.m. the plaintiffs were arrested by Dallas Police Department officers and charged with violating Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

(d) A record of the arrest mentioned above is maintained in the files of the Dallas Police Department.

(e) Information contained in the arrest records as maintained by the Dallas Police Department is available to other law enforcement agencies upon their request.

(f) That records of Plaintiffs' arrests in this instance have been forwarded to the regional data center maintained by the Texas Department of Public Safety. That records of Plaintiffs' arrests have been forwarded to the National Crime Information Center maintained by the Federal Bureau of Investigation.

(g) That of the present date, the Dallas Police Department is continuing to enforce the ordinance referred to as Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone 692-2599

Requests for Admissions From Respondent Hugh Jones

[CAPTION OMITTED]

PLAINTIFFS, Tom E. Ellis and Robert D. Love, request defendant, HUGH JONES, within 45 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial:

That each of the following statements is true:

(a) On February 22, 1972 Plaintiffs were convicted in Corporation Court No. 6 of the City of Dallas for violating 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

(b) A record of these convictions is maintained in the records of the corporation courts of the City of Dallas.

(c) The records of conviction in the corporation courts of the City of Dallas are open to inspection by the public.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone 692-2599

Petitioners' Request for the Production of Documents Pursuant to Rule 34 F.R.C.P.

Plaintiffs, Tom E. Ellis and Robert D. Love, request defendant Frank M. Dyson to respond within 45 days to the following request:

(1) That defendant Dyson, his staff and subordinates, produce and permit plaintiffs to inspect and copy each of the following documents:

(a) The arrest report filed by the police officer(s) who arrested plaintiffs at about 2 o'clock a.m. on January 18, 1972.

(b) The arrest record initiated by and maintained in the Dallas Police Department relative to each of these plaintiffs.

(c) Any and all other records and reports relating to or bearing the names of the plaintiffs herein, and growing out of their arrests on January 18, 1972.

(2) That the defendant Dyson arrange for inspection and copying of each of the documents stated above on or before May 10th, 1972. Plaintiffs are willing to carry out this inspection and copying at the convenience of defendant Dyson, during normal business hours, if this informal procedure is acceptable to defendant Dyson and his superiors, defendants Scott McDonald and Wes Wise.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone 692-2599

Hugh Jones' Answers to Request for Admissions

COMES NOW Defendant HUGH JONES and makes the following answers to Request for Admissions filed by Plaintiffs on March 27, 1972:

(a) Admitted

(b) Admitted

(c) Admitted

THOMAS B. THORPE
Attorney for Defendant
501 Municipal Building
Dallas, Texas 75201
748-9711, ext. 294

Frank M. Dyson's Answers to Request for Admissions

[CAPTION OMITTED]

COMES NOW Defendant FRANK M. DYSON and makes the following answers to Request for Admissions filed by Plaintiffs on March 27, 1972:

(a) Admitted

(b) Admitted

(c) Admitted

(d) Admitted

(e) Admitted

(f) Denied

Denial based upon best information and belief available that Plaintiff's Records of Arrest were not forwarded to any other agency. It is the general policy of the Dallas Police Department that records of arrest for ordinance violations as indicated in this case are not routinely forwarded to the Federal Bureau of Investigation or the Texas Department of Public Safety.

(g) Admitted.

THOMAS B. THORPE
Attorney for Defendant
501 Municipal Building
Dallas, Texas 75201
748-9711, ext. 294

Petitioners' Application for a Writ of Prohibition to the Texas Court of Criminal Appeals

IN THE

COURT OF CRIMINAL APPEALS
OF TEXAS

[CAPTION OMITTED]

To the Said Honorable Court:

COME NOW, TOM E. ELLIS and ROBERT D. LOVE, Relators herein, and respectfully represent to and show this Honorable Court:

I.

The Relators herein, Tom E. Ellis and Robert D. Love, are residents of the City of Dallas, Texas.

The Respondent, Harold C. Dimon, Judge of Corporation Court Number 6 of the City of Dallas, Texas, is vested with authority to adjudicate cases arising under the ordinances of the City of Dallas.

II.

Relators were arrested on Tuesday, January 18, 1972, at about 2 a.m. o'clock, and charged by the City of Dallas with violation of Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance Number 12991, commonly called and charged as "loitering". Relators have each posted bonds of $52.50 and the case has been set down for trial on February 22nd,

1972, in Corporation Court Number 6, at 6 p.m., in the City of Dallas, Texas.

III.

This Honorable Court has jurisdiction to issue the Writ of Prohibition by virtue of Article V, Section 5 of the Constitution of Texas.

IV.

Relators would show this Honorable Court that said Corporation Court Number 6 has no jurisdiction of this case because the section of the Dallas City Code under which it is brought is unconstitutional and therefore void. A law which is unconstitutional and void confers no jurisdiction on said Corporation Court Number 6; therefore, the Corporation Court Number 6 is exceeding its jurisdiction, and proceeding without jurisdiction in this case.

A copy of Section 31-60 of the Dallas City Code is attached hereto as Exhibit "A" and is expressly made part hereof for any and all purposes.

V.

Said section, commonly called and charged as "loitering", is unconstitutional on its face as a violation of the rights and privileges guaranteed to Relators by and through the Constitution of the United States, for the following reasons:

a. The provision denies Relators due process of law because of vagueness and over-broad wording, which makes it impossible for Relators to determine its meaning in order that they may regulate their conduct in accordance with the terms of the ordinance.

b. The provision denies Relators equal protection of law because it depends for definition of the offense upon the moment-by-moment opinions and suspicions of a police officer on patrol.

c. The provision is an unreasonable exercise of police power in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution, because it condemns as illegal conduct which is clearly outside that which may reasonably be controlled and proscribed by the City of Dallas, and which the City of Dallas may seek to regulate.

d. The provision violates the Fourth and Fourteenth Amendments to the United States Constitution because it permits arrest on the basis of alarm or concern only. Relators would show this Honorable Court that, while the provision is framed in terms of "probable cause", a full reading reveals that merely arousing alarm or concern of a police officer is made an offense under this ordinance.

VI.

Relators would further show this Honorable Court that no adequate remedy at law exists in this case. The Corporation Courts of the City of Dallas have entertained over two hundred cases charging "loitering" in the past six months, the Relators represent and would show this Honorable Court that of those prosecutions, the City of Dallas, by and through its Corporation Courts, and the County Appellate Court, Judge Newton Fitzhugh, Presiding Judge, have dismissed practically every case wherein the defendant sought trial on the merits. (See Exhibits B-E). The effect of this action is to deny any remedy-at-

law, by way of the normal appellate processes, wherein the issue which Relators raise herein, (i.e. the constitutionality of said Section 31-60) might be heard in a court of record. Exhibits B through E are attached hereto and made part hereof for any and all legal purposes.

VII.

Relators represent to, and would show this Honorable Court, that they have good reason to believe, and do believe, that as a result of the previous dismissals by the Corporation Court of Dallas, Texas, their cases will also be dismissed prior to trial on the merits. Relators would show this Honorable Court that, under those circumstances, they cannot vindicate their rights by defending against one criminal prosecution, but rather, that they and all others charged under this ordinance face continued prosecution, which under these circumstances constitutes *de facto* harassment contrary to the guarantees of the Constitution of the United States.

VIII.

Relators would show this Honorable Court that the general dismissals of prosecutions for "loitering" by the City of Dallas and its Corporation Courts have left Relators with no adequate remedy save this extraordinary writ, and that said writ should therefore issue to said Corporation Court Number 6 of the City of Dallas, as a matter of right.

IX.

Relators, in the alternative to Paragraph VIII, would show this Honorable Court that the Writ of Prohibition should issue to Harold C. Dimon, Judge of the Corporation

Court Number 6, as a discretionary writ of judicial administration, to prevent further hardship being visited upon your Relators, and all other persons who may in the future be prosecuted under this unconstitutional ordinance. Relators would show this Honorable Court that the interests of justice and judicial administration can best be served by issue of the writ as prayed immediately hereafter.

WHEREFORE, premises considered, your Relators, Tom E. Ellis and Robert D. Love, pray that this Honorable Court grant the following relief:

1) Issue a Temporary Writ of Prohibition to Respondent herein, directing said Honorable Judge to desist and refrain from any further proceedings in said prosecutions of Relators for "loitering," pending a final adjudication on this Application;

2) Issue a permanent Writ of Prohibition to the Corporation Court Number 6, and all other Corporation Courts of the City of Dallas, Texas, ordering said courts to cease and desist from entertaining any further prosecutions under this unconstitutional and void ordinance, or from exercising jurisdiction over any prosecutions arising under said ordinance; and

3) Grant such further relief as this Honorable Court may deem proper.

TOM E. ELLIS
Relator

[Jurats omitted in printing]

Affidavit of Henry J. Albach, III

THE STATE OF TEXAS,
COUNTY OF DALLAS:

BEFORE ME, the undersigned authority, personally appeared HENRY J. ALBACH, III., who being first duly sworn, stated as follows:

My name is Henry J. Albach, III., and I am an adult person, have never been convicted of a felony, and am competent to make this Affidavit.

Since January of 1970 I have served as President of the Dallas Civil Liberties Union (DCLU), an organization dedicated to the protection and the preservation of the rights set forth in the Bill of Rights of the United States Constitution.

On July 20, 1970, the Dallas City Council adopted Section 31-60, known as the Dallas loitering ordinance. The DCLU was quite concerned about this ordinance and our cooperating attorneys advised that under the applicable federal and Texas cases it was patently unconstitutional. We therefore resolved to assist persons charged with loitering and to take legal action to challenge its validity.

Since July of 1970 we have been contacted by more than a dozen persons charged with loitering and at their request we asked a volunteer DCLU cooperating attorney to contact such persons. Our volunteer attorneys were in each instance authorized by such person to undertake his defense and to challenge the ordinance.

To date, more than a year and a half since this law was enacted, we have been completely unable to obtain a ruling on the constitutional question from any state or municipal court in Dallas. Most of the cases were dismissed when the complaints were quashed as being improperly worded. One case was appealed to the County Court but never came to trial because a clerk lost the docket file. One defendant, who had been in jail for three days, was released twenty minutes after a volunteer lawyer appeared at the City Jail. Two cases were tried and the Corporation Court acquitted. Two other persons, who were arrested while walking in a public park, served three days in City Jail and then had their fines reduced and were released after another of our volunteer lawyers appeared at the City Jail. In yet another case, the Corporation Court quashed the complaint, the City refiled its charges, the new complaint was then quashed, a third complaint was then filed, and was found to be sufficient, and the City then voluntarily dropped the charges and dismissed the case.

As President of the DCLU, I am extremely concerned about the continuing enforcement of this ordinance. Our cooperating attorneys, at the request and authorization of the many persons who have contacted us, have diligently represented their clients and have attempted to challenge the constitutionality of this law. To date, after hundreds of persons have reportedly been arrested for loitering, no court in Dallas has ruled on this important constitutional question. I am advised that litigants must "exhaust" their state remedies in these cases, however, the loitering ordinance will continue to be enforced unless a court of this state has an opportunity to consider the serious questions presented. I believe that this is a very important ques-

tion of law and public policy, and that a swift judicial determination of the issues presented would be in the interests of the hundreds of thousands of law-abiding citizens of Dallas who daily are guilty of "loitering" as defined in this ordinance.

HENRY J. ALBACH, III.

[Jurat omitted in printing]

Affidavit of Edward Koppman

THE STATE OF TEXAS,
COUNTY OF DALLAS.

BEFORE ME, the undersigned authority, personally appeared EDWARD KOPPMAN, who, being first duly sworn, stated as follows:

My name is EDWARD KOPPMAN and I am an attorney duly licensed to practice law in Texas, and I am practicing law in Dallas, Dallas County, Texas. I am an adult person and have never been convicted of a felony, and I am competent and qualified to make this affidavit.

During 1971, I was asked by the Dallas Civil Liberties Union to represent four persons charged by the City of Dallas with the crime of loitering and to do whatever was necessary and proper to challenge the constitutionality of the Dallas loitering ordinance, Section 31-60 of the City of Dallas Revised Code. I accepted these representations and was then expressly retained and authorized by these four persons to represent them and to so challenge the validity of the said ordinance.

On Saturday, January 23, 1971, I appeared in Dallas Corporation Court on behalf of two teenage boys who were arrested and charged with loitering for driving down an alley near the home of one of the boys. They each entered pleas of not guilty, and after the Court overruled motions to dismiss on the grounds of unconstitutionality, the cases were tried. At the close of the evidence, both moved for acquittal, and the motion was granted.

I also have represented THEO VERNELL GREEN, in Cause No. 71-228-D, and RONNIE CHARLES GRAY, in Cause No. 71-

227-D, both of whom were charged with loitering and both of whom authorized counsel to attack the constitutionality of the loitering ordinance. At their request, pleas of nolo contendere were entered in Corporation Court and the convictions were, in January of 1971, appealed to the County Criminal Court of Appeals of Dallas County, Texas. When the cases were called for pre-trial, I filed motions to dismiss on the grounds of unconstitutionality and submitted authorities to the Court in support of the motions. In August of 1971, after the Court had the motions under advisement for about five months, I checked with the Court and was advised by the Clerk that the Court, on its own motion, had quashed the complaints as improperly drawn. Mr. Gray and Mr. Jones had been arrested while standing on a street corner at night, and our evidence would have shown that they were law-abiding citizens who were innocent of any wrongdoing and of any intent to commit any substantive crime.

EDWARD KOPPMAN

[Jurat omitted in printing]

Affidavit of Robert E. Goodfriend

THE STATE OF TEXAS,
COUNTY OF DALLAS:

BEFORE ME, the undersigned authority, personaliy appeared ROBERT E. GOODFRIEND, who, being first sworn, stated: I am an adult person, have never been convicted of a felony, and I am competent to make this affidavit. I am an attorney practicing law in Dallas County, Texas, and I am duly licensed to practice law in Texas.

In August of 1970, at the request of the Dallas Civil Liberties Union, I volunteered to accept the representation of MR. EARNEST WRIGHT, who had been charged by the City of Dallas with loitering. I visited Mr. Wright at the Dallas City Jail and was specifically authorized by him to represent him and to take appropriate legal action to challenge the validity and constitutionality of the Dallas loitering ordinance.

Mr. Wright advised me that he was arrested on August 3, 1970, while he was standing on a public street in Dallas observing buses going in and out of a bus terminal. He was not charged with any other substantive crime and the evidence would have shown that he was a law abiding citizen innocent of any intention to commit any crime at the time he was arrested.

He remained in the Dallas City Jail from August 3, 1970, to August 5, 1970, at which time I conferred with him at the Jail. Following our conference, I went down to the bond desk to arrange for his release and I was then advised that the City had dropped charges and released Mr. Wright.

ROBERT E. GOODFRIEND

[Jurat omitted in printing]

Affidavit of Lon Curtis

THE STATE OF TEXAS,
COUNTY OF DALLAS:

My name is Lon Curtis. I am a senior law student at Southern Methodist University in Dallas, Texas. I live at 2933 Binkley, Apartment 44, in the city of University Park, Texas. I am twenty-five years of age.

During the preceding five months, that is, from September 1971 through January, 1972, I have been involved in a research project in conjunction with a course at the School of Law, the scope of which was to survey and study the policy and application of *Section 31-60* of the Dallas City Code, commonly called "loitering", by the police and courts of Dallas.

During the course of this research, I surveyed the court dockets of the Corporation Courts of Dallas, Texas, in order to ascertain the number of persons brought to prosecution each month for the offense of "loitering", to ascertain the disposition of these prosecutions by the Corporation Courts of Dallas, Texas, and to produce a general statistical analysis of the enforcement of this ordinance by the City of Dallas.

The results of the aforementioned research indicated that a minimum of approximately forty cases charging loitering are filed in the Corporation Courts each month. The bases for this conclusion were the court records for the period of April, 1971 through October, 1971. In several months, however, the number of loitering cases was well in excess of fifty.

The statistical study of the dockets also indicated that a substantial number of the cases filed in each month were

dismissed or quashed prior to trial on the merits. Further research indicated that of those cases dismissed or quashed, practically all involved defendants who had pleaded *not* guilty and who were represented by counsel; conversely, none of the dismissed or quashed cases involved a defendant who was *not* represented by counsel, regardless of the plea entered.

In several months, up to a fourth of all cases filed under this ordinance were either dismissed or quashed, prior to trial on the merits. Of the remaining cases, approximately a third involved bond forfeitures, and the remaining defendants either paid a fine or served jail time for the offense.

The foregoing conclusions represent over four months of critical, objective statistical analysis of the docket records of the Corporation Courts of Dallas, Texas, and are, to my knowledge, an accurate reflection of the circumstances surrounding enforcement of *Section 31-60* of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas.

LON CURTIS

[Jurat omitted in printing]

Petitioners' Motion for Summary Judgment

[CAPTION OMITTED]

In accordance with the provisions of Rule 56, Federal Rules of Civil Procedure, Plaintiffs TOM E. ELLIS and ROBERT D. LOVE, move the court for a summary judgment on the grounds that the pleadings, admissions, and other matters of record, pertinent portions of which are summarized in a statement attached hereto as Exhibit A, and the affidavit of ROBERT D. LOVE, attached hereto, show that there is no dispute as to any material fact and that the Plaintiffs are entitled to a judgment as a matter of law.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone: 692-2599

EXHIBIT A

SUMMARY OF MATTERS OF RECORD WHICH ARE UNDISPUTED IN THIS CASE

1. Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas is a part of the current ordinances of the City of Dallas (N. Alex Bickley's Answer to Request for Admissions. Ordinance is attached as Exhibit A to the Complaint herein.)
2. On January 18, 1972 at about 2:00 a.m. the Plaintiffs were arrested by Dallas Police Department officers and charged with violating said ordinance (Frank Dyson's Answers to Request for Admissions).
3. A record of those arrests is maintained in the files of the Dallas Police Department, which records are available to other law enforcement agencies upon their request (Frank Dyson's Answers to Requests for Admissions).
4. Copies of those records as maintained in the Dallas Police Department files are attached hereto as exhibits.
5. On February 22, 1972, Plaintiffs were convicted in corporation court No. 6 of the City of Dallas, Texas for violating said ordinance (Hugh Jones' Answers to Requests for Admissions).
6. A record of those convictions is maintained in the Records of the Corporation Courts which records are open to inspection by the public (Hugh Jones' Answers to Requests for Admissions).
7. The Dallas Police Department is continuing to enforce the ordinance in question (Frank Dyson's Answers to Requests for Admissions).

3C

CITY OF DALLAS
TEXAS
LEGAL DEPARTMENT

N. ALEX BICKLEY
CITY ATTORNEY

MUNICIPAL BUILDING
DALLAS, TEXAS 75201

12 MAY 1972

Mr. Walter W. Steele, Jr.
Attorney at Law
3315 Daniels
Dallas, Texas 75205

Re: ELLIS, ET AL., V. DYSON, ET AL.
Civil Action No. CA-3-5702-D
REQUEST FOR PRODUCTION OF DOCUMENTS
UNDER RULE 34, F.R.C.P.

Dear Mr. Steele:

In conformity with your Request For Production of Documents filed on March 27, 1972, I enclose herewith the following documents:

1. Police Department arrest report, Thomas E. Ellis
2. Police Department arrest report, Robert Dennis Love
3. Prisoners activity report, Thomas E. Ellis
4. Prisoners activity report, Robert Dennis Love
5. Booking Cards for Thomas E. Ellis and Robert Dennis Love
6. Alias ticket upon which outstanding warrant was in effect for Thomas E. Ellis on January 18, 1972.

This production of records complies with your above reference request.

Very truly yours,

Tom Thorpe

THOMAS B. THORPE
Assistant City Attorney

TBT/kf
Enclosure

cc: Joseph McElroy, Jr.
Clerk, United States District Court

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POLICE DEPARTMENT
CITY OF DALLAS

ELLIS, THOMAS
11517 ROCKCREST
7000 PEMBERTON
W M 5-1-50 21 6' 185 Br. Br.
Public Roadway
J T CAREY 2448
DALLAS
412175042I
449909272
Loitering, Under Susp Circ Ticket
1-18-72 2am
7000 Pemberton
Car Comp
Acme
EASTFIELD COLLEGE
STUDENT
327 5TH
746 3215
Adult

Officer observed above susp and a Pickup Van C-in-22 driving and sitting in the area of 7000 Pemberton. Officer observed no burglary alarm 7008 Pemberton; this area has several new homes under construction and has had several theft of tools and bags. Susp lives in different area of town and time was 2am. Susp also found to have alias ticket.

TICKET 796830 DOCKET 252026 WARRANT 29963 Sec 17 Sec 1 Sec 2 Sec 3 Sec 4 Sec 5 Sec 6 Sec 7 Sec 8 Sec 9 Sec 10 Sec 11 Sec 12 Sec 13 Sec 14 Sec 15 Sec 16 Sec 17 Sec 18 Sec 19 Sec 20 Sec 21 Sec 22 Sec 23 Sec 24 Sec 25 Sec 26 Sec 27 Sec 28 Sec 29 Sec 30 Sec 31 Sec 32 Sec 33 Sec 34 Sec 35 Sec 36 Sec 37 Sec 38 Sec 39 Sec 40 Sec 41 Sec 42 Sec 43 Sec 44 Sec 45 Sec 46 Sec 47 Sec 48 Sec 49 Sec 50 Sec 51 Sec 52 Sec 53 Sec 54 Sec 55 Sec 56 Sec 57 Sec 58 Sec 59 Sec 60 Sec 61 Sec 62 Sec 63 Sec 64 Sec 65 Sec 66 Sec 67 Sec 68 Sec 69 Sec 70 Sec 71 Sec 72 Sec 73 Sec 74 Sec 75 Sec 76 Sec 77 Sec 78 Sec 79 Sec 80 Sec 81 Sec 82 Sec 83 Sec 84 Sec 85 Sec 86 Sec 87 Sec 88 Sec 89 Sec 90 Sec 91 Sec 92 Sec 93 Sec 94 Sec 95 Sec 96 Sec 97 Sec 98 Sec 99 Sec 100 Sec 101 Sec 102 Sec 103 Sec 104 Sec 105 Sec 106 Sec 107 Sec 108 Sec 109 Sec 110 Sec 111 Sec 112 Sec 113 Sec 114 Sec 115 Sec 116 Sec 117 Sec 118 Sec 119 Sec 120 Sec 121 Sec 122 Sec 123 Sec 124 Sec 125 Sec 126 Sec 127 Sec 128 Sec 129 Sec 130 Sec 131 Sec 132 Sec 133 Sec 134 Sec 135 Sec 136 Sec 137 Sec 138 Sec 139 Sec 140 Sec 141 Sec 142 Sec 143 Sec 144 Sec 145 Sec 146 Sec 147 Sec 148 Sec 149 Sec 150 Sec 151 Sec 152 Sec 153 Sec 154 Sec 155 Sec 156 Sec 157 Sec 158 Sec 159 Sec 160 Sec 161 Sec 162 Sec 163 Sec 164 Sec 165 Sec 166 Sec 167 Sec 168 Sec 169 Sec 170 Sec 171 Sec 172 Sec 173 Sec 174 Sec 175 Sec 176 Sec 177 Sec 178 Sec 179 Sec 180 Sec 181 Sec 182 Sec 183 Sec 184 Sec 185 Sec 186 Sec 187 Sec 188 Sec 189 Sec 190 Sec 191 Sec 192 Sec 193 Sec 194 Sec 195 Sec 196 Sec 197 Sec 198 Sec 199 Sec 200 Sec 201 Sec 202 Sec 203 Sec 204 Sec 205 Sec 206 Sec 207 Sec 208 Sec 209 Sec 210 Sec 211 Sec 212 Sec 213 Sec 214 Sec 215 Sec 216 Sec 217 Sec 218 Sec 219 Sec 220 Sec 221 Sec 222 Sec 223 Sec 224 Sec 225 Sec 226 Sec 227 Sec 228 Sec 229 Sec 230 Sec 231 Sec 232 Sec 233 Sec 234 Sec 235 Sec 236 Sec 237 Sec 238 Sec 239 Sec 240 Sec 241 Sec 242 Sec 243 Sec 244 Sec 245 Sec 246 Sec 247 Sec 248 Sec 249 Sec 250 Sec 251 Sec 252 Sec 253 Sec 254 Sec 255 Sec 256 Sec 257 Sec 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383 Sec 384 Sec 385 Sec 386 Sec 387 Sec 388 Sec 389 Sec 390 Sec 391 Sec 392 Sec 393 Sec 394 Sec 395 Sec 396 Sec 397 Sec 398 Sec 399 Sec 400 Sec 401 Sec 402 Sec 403 Sec 404 Sec 405 Sec 406 Sec 407 Sec 408 Sec 409 Sec 410 Sec 411 Sec 412 Sec 413 Sec 414 Sec 415 Sec 416 Sec 417 Sec 418 Sec 419 Sec 420 Sec 421 Sec 422 Sec 423 Sec 424 Sec 425 Sec 426 Sec 427 Sec 428 Sec 429 Sec 430 Sec 431 Sec 432 Sec 433 Sec 434 Sec 435 Sec 436 Sec 437 Sec 438 Sec 439 Sec 440 Sec 441 Sec 442 Sec 443 Sec 444 Sec 445 Sec 446 Sec 447 Sec 448 Sec 449 Sec 450 Sec 451 Sec 452 Sec 453 Sec 454 Sec 455 Sec 456 Sec 457 Sec 458 Sec 459 Sec 460 Sec 461 Sec 462 Sec 463 Sec 464 Sec 465 Sec 466 Sec 467 Sec 468 Sec 469 Sec 470 Sec 471 Sec 472 Sec 473 Sec 474 Sec 475 Sec 476 Sec 477 Sec 478 Sec 479 Sec 480 Sec 481 Sec 482 Sec 483 Sec 484 Sec 485 Sec 486 Sec 487 Sec 488 Sec 489 Sec 490 Sec 491 Sec 492 Sec 493 Sec 494 Sec 495 Sec 496 Sec 497 Sec 498 Sec 499 Sec 500 Sec 501 Sec 502 Sec 503 Sec 504 Sec 505 Sec 506 Sec 507 Sec 508 Sec 509 Sec 510 Sec 511 Sec 512 Sec 513 Sec 514 Sec 515 Sec 516 Sec 517 Sec 518 Sec 519 Sec 520 Sec 521 Sec 522 Sec 523 Sec 524 Sec 525 Sec 526 Sec 527 Sec 528 Sec 529 Sec 530 Sec 531 Sec 532 Sec 533 Sec 534 Sec 535 Sec 536 Sec 537 Sec 538 Sec 539 Sec 540 Sec 541 Sec 542 Sec 543 Sec 544 Sec 545 Sec 546 Sec 547 Sec 548 Sec 549 Sec 550 Sec 551 Sec 552 Sec 553 Sec 554 Sec 555 Sec 556 Sec 557 Sec 558 Sec 559 Sec 560 Sec 561 Sec 562 Sec 563 Sec 564 Sec 565 Sec 566 Sec 567 Sec 568 Sec 569 Sec 570 Sec 571 Sec 572 Sec 573 Sec 574 Sec 575 Sec 576 Sec 577 Sec 578 Sec 579 Sec 580 Sec 581 Sec 582 Sec 583 Sec 584 Sec 585 Sec 586 Sec 587 Sec 588 Sec 589 Sec 590 Sec 591 Sec 592 Sec 593 Sec 594 Sec 595 Sec 596 Sec 597 Sec 598 Sec 599 Sec 600 Sec 601 Sec 602 Sec 603 Sec 604 Sec 605 Sec 606 Sec 607 Sec 608 Sec 609 Sec 610 Sec 611 Sec 612 Sec 613 Sec 614 Sec 615 Sec 616 Sec 617 Sec 618 Sec 619 Sec 620 Sec 621 Sec 622 Sec 623 Sec 624 Sec 625 Sec 626 Sec 627 Sec 628 Sec 629 Sec 630 Sec 631 Sec 632 Sec 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758 Sec 759 Sec 760 Sec 761 Sec 762 Sec 763 Sec 764 Sec 765 Sec 766 Sec 767 Sec 768 Sec 769 Sec 770 Sec 771 Sec 772 Sec 773 Sec 774 Sec 775 Sec 776 Sec 777 Sec 778 Sec 779 Sec 780 Sec 781 Sec 782 Sec 783 Sec 784 Sec 785 Sec 786 Sec 787 Sec 788 Sec 789 Sec 790 Sec 791 Sec 792 Sec 793 Sec 794 Sec 795 Sec 796 Sec 797 Sec 798 Sec 799 Sec 800 Sec 801 Sec 802 Sec 803 Sec 804 Sec 805 Sec 806 Sec 807 Sec 808 Sec 809 Sec 810 Sec 811 Sec 812 Sec 813 Sec 814 Sec 815 Sec 816 Sec 817 Sec 818 Sec 819 Sec 820 Sec 821 Sec 822 Sec 823 Sec 824 Sec 825 Sec 826 Sec 827 Sec 828 Sec 829 Sec 830 Sec 831 Sec 832 Sec 833 Sec 834 Sec 835 Sec 836 Sec 837 Sec 838 Sec 839 Sec 840 Sec 841 Sec 842 Sec 843 Sec 844 Sec 845 Sec 846 Sec 847 Sec 848 Sec 849 Sec 850 Sec 851 Sec 852 Sec 853 Sec 854 Sec 855 Sec 856 Sec 857 Sec 858 Sec 859 Sec 860 Sec 861 Sec 862 Sec 863 Sec 864 Sec 865 Sec 866 Sec 867 Sec 868 Sec 869 Sec 870 Sec 871 Sec 872 Sec 873 Sec 874 Sec 875 Sec 876 Sec 877 Sec 878 Sec 879 Sec 880 Sec 881 Sec 882 Sec 883 Sec 884 Sec 885 Sec 886 Sec 887 Sec 888 Sec 889 Sec 890 Sec 891 Sec 892 Sec 893 Sec 894 Sec 895 Sec 896 Sec 897 Sec 898 Sec 899 Sec 900 Sec 901 Sec 902 Sec 903 Sec 904 Sec 905 Sec 906 Sec 907 Sec 908 Sec 909 Sec 910 Sec 911 Sec 912 Sec 913 Sec 914 Sec 915 Sec 916 Sec 917 Sec 918 Sec 919 Sec 920 Sec 921 Sec 922 Sec 923 Sec 924 Sec 925 Sec 926 Sec 927 Sec 928 Sec 929 Sec 930 Sec 931 Sec 932 Sec 933 Sec 934 Sec 935 Sec 936 Sec 937 Sec 938 Sec 939 Sec 940 Sec 941 Sec 942 Sec 943 Sec 944 Sec 945 Sec 946 Sec 947 Sec 948 Sec 949 Sec 950 Sec 951 Sec 952 Sec 953 Sec 954 Sec 955 Sec 956 Sec 957 Sec 958 Sec 959 Sec 960 Sec 961 Sec 962 Sec 963 Sec 964 Sec 965 Sec 966 Sec 967 Sec 968 Sec 969 Sec 970 Sec 971 Sec 972 Sec 973 Sec 974 Sec 975 Sec 976 Sec 977 Sec 978 Sec 979 Sec 980 Sec 981 Sec 982 Sec 983 Sec 984 Sec 985 Sec 986 Sec 987 Sec 988 Sec 989 Sec 990 Sec 991 Sec 992 Sec 993 Sec 994 Sec 995 Sec 996 Sec 997 Sec 998 Sec 999 Sec 1000

J. Alonzo 227
1-18-72 2:40AM
CASH BOND # 157526 + 157527 CT 3
10am 1-29-72 70 + 5 CC
CB 151526 2250 1-18-72 2am Ct 3 1-29-72 INDEXED 10AM

(2)

ARREST REPORT — POLICE DEPARTMENT, CITY OF DALLAS

Date Occurred	253
Beat	NE
Location of Arrest / Address	7000 Pemberton
Premise Type	Public Roadway
Service Serial No.	33-7449-632
Selective Service No.	
Name	Love, Robert Dennis
Address	5225 Belmont
Race / Sex / D.O.B. / Age / Ht. / Wt. / Hair / Eyes / Marital	M / C / 12-3-49 / 22 / 5-9 / 135 / Black / Brown
Arresting Officer	J.T. Carey
Badge No.	2445
Place of Birth	Ohio
Social Security No.	32-48-9241
Charge	Loitering Under Sus. Circum.
How Arrest Made	Non Vio.
Date / Time	1-18-72 2 AM
Disposition	East Comd
Narcotic	
Weapon Described	None
Armed	
Investigating Officer – Badge No.	
Other Arresting Officer – Badge No.	
Alias or Nickname	None
Where Defendant Employed or School	SMU
Occupation	Student
Res. Phone	526-1598
Bus. Phone	
Lic. No. / State	OHIO
Year / Make / Body / Color	67 Ford 2dr Blue
Opr. Lic. No. / State	093562 Tex
Hold Placed on Vehicle/Towed To	
Property Placed in Property Room	
Father (Name)	Hall
Address / City / Res. Phone / Bus. Phone	
Mother (Maiden)	
Guardian or Next of Kin	
Complainant	
Witness	

18 Jul

Name of Parent/Guardian/Next of Kin Notified — Date/Time — Officer — Badge No.

Narrative:

Officer Answered a burglary alarm at 7008 Pemberton. Above defendant was seen sitting and driving in the area. This area has several new houses under construction and has had numerous theft of pipe and burglarys. The time was 2am and defendant lives in a different part of town. Defendant was with a Thomas E. Ellis who also arrested for loitering and also tickets

Officer — Badge No. — Transporting Officer — Badge No. — Booking Officer — Badge No.

1-11-72 2 AM

Transporting Officer — Badge No. — Searched By

Cash Bond # 151525 CT 3 10 AM

1-29-72 50.00 + 2.50 CC

CB 151525 $52.50 1-18-72 2 PM CT 3 INDEXED 1-29-72 10 AM

(1)

PRISONER'S ACTIVITY REPORT — POLICE DEPARTMENT, CITY OF DALLAS

Name (Last, First, Middle) — Address — City — Race — Sex — Age — S.S.N.

Ellis, Thomas — 11517 Rockcreek D — W M 21 5-1-50

Charge: Loitering Under Sus. Circ. Also Ticket

Arresting Officers: J.T. Carey 2445 — District Station: NE

Condition — Drunk — Sick — Injured — Normal: X — Medical Treatment — Location Where Treated

Location of Arrest: 7000 Pemberton — Date of Arrest: 1-18-72 — Time of Arrest: 2AM

Car Impounded — Location — Property in Property Room: X

Below Filled In By Jail Personnel — Date Received — Time Received — Jailer — Cell No.

Prisoner Fingerprinted — Photographed — Change Charged To:

Telephone Record — Date / Time / Contact / Yes No / Declined / Use — Date / Time / Contact / Yes No / Declined / Use

Date	Time Out	Time In	Reason for Movement of Prisoner:	Investigator	Jailer

Prisoner's Personal Property: Cash — Purse — Watch — Knife — Keys — Glasses — Ring — Pen — Pencil — Lighter — Package — Check — Beer — Wine — Whiskey — Miscellaneous — Searched By — Jailer on Desk — Property Rel. By — Property Rec. By

Released By: J.R. Schreck

Time: 2 5m AM — Date: 1-15-72

How: C.B. — No. of Meals

Date Served

Jailer's Comments

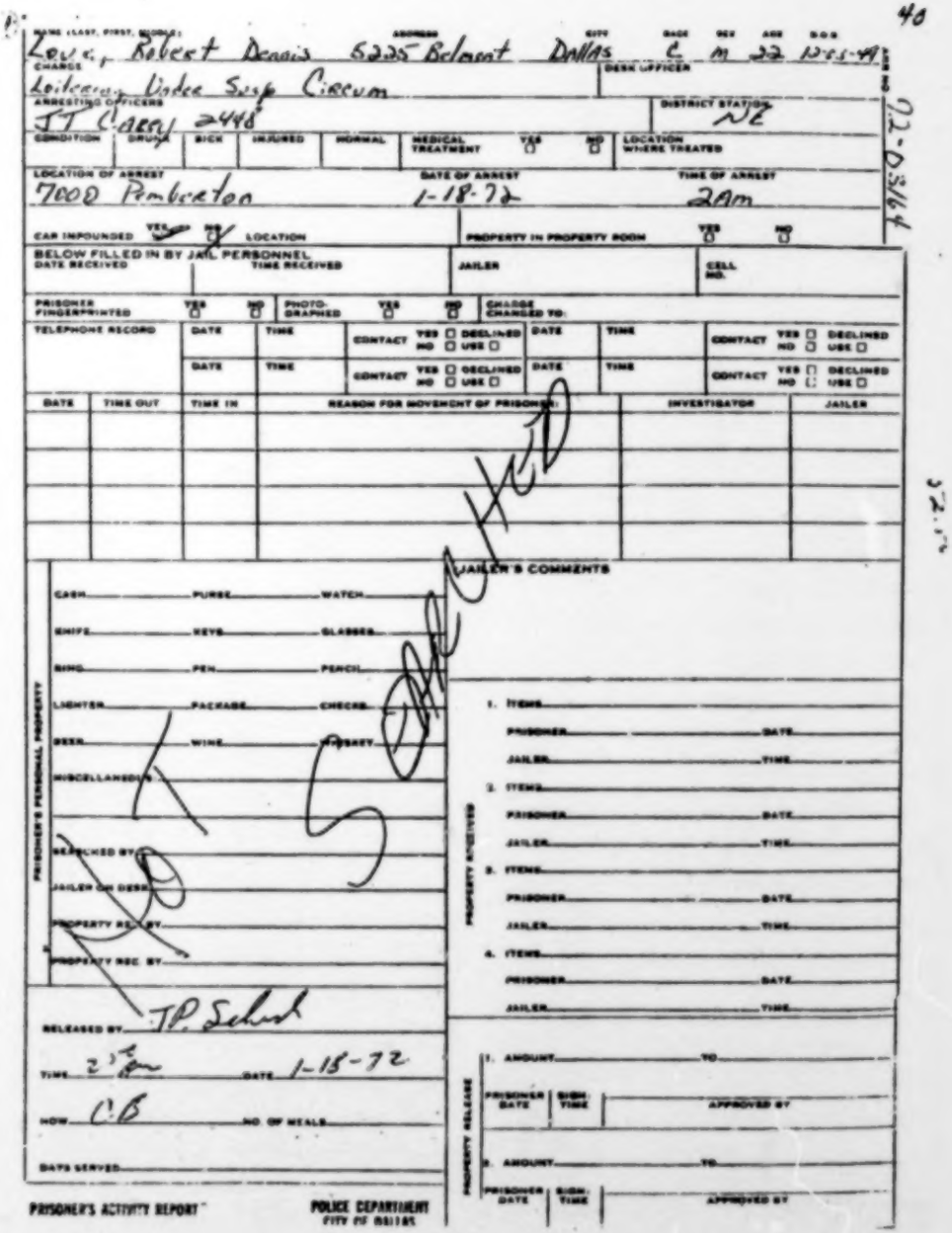
1. Items — Prisoner — Date — Jailer — Time
2. Items — Prisoner — Date — Jailer — Time
3. Items — Prisoner — Date — Jailer — Time
4. Items — Prisoner — Date — Jailer — Time

Property Release: 1. Amount — To — Prisoner Date — Sign Time — Approved By

2. Amount — To — Prisoner Date — Sign Time — Approved By

Prisoner's Activity Report — Form 64-1300

Police Department, City of Dallas



40

Love, Robert Dennis 5225 Belmont Dallas C M 22 12-3-49

CHARGE: Loitering Under Susp Circum

DESK OFFICER:

ARRESTING OFFICERS: JT Carey 2448

DISTRICT STATION: NW

CONDITION | DRUGS | SICK | INJURED | NORMAL | MEDICAL TREATMENT YES NO | LOCATION WHERE TREATED

LOCATION OF ARREST: 7000 Pemberton

DATE OF ARREST: 1-18-72

TIME OF ARREST: 2Am

CAR IMPOUNDED YES NO X LOCATION

PROPERTY IN PROPERTY ROOM YES NO

BELOW FILLED IN BY JAIL PERSONNEL
DATE RECEIVED | TIME RECEIVED | JAILER | CELL NO.

PRISONER FINGERPRINTED YES NO | PHOTOGRAPHED YES NO | CHARGE CHANGED TO:

TELEPHONE RECORD

DATE	TIME	CONTACT YES NO DECLINED USE	DATE	TIME	CONTACT YES NO DECLINED USE
DATE	TIME	CONTACT YES NO DECLINED USE	DATE	TIME	CONTACT YES NO DECLINED USE

DATE	TIME OUT	TIME IN	REASON FOR MOVEMENT OF PRISONER	INVESTIGATOR	JAILER

PRISONER'S PERSONAL PROPERTY

CASH PURSE WATCH
KNIFE KEYS GLASSES
RING PEN PENCIL
LIGHTER PACKAGE CHECKS
BEER WINE WHISKEY
MISCELLANEOUS
RECEIVED BY
JAILER ON DESK
PROPERTY RET BY
PROPERTY REC BY

JAILER'S COMMENTS

PROPERTY RELEASED
1. ITEMS
PRISONER DATE
JAILER TIME
2. ITEMS
PRISONER DATE
JAILER TIME
3. ITEMS
PRISONER DATE
JAILER TIME
4. ITEMS
PRISONER DATE
JAILER TIME

RELEASED BY: TP Schuh

TIME: 2 Pm DATE: 1-18-72

HOW: CB NO. OF MEALS

DAYS SERVED

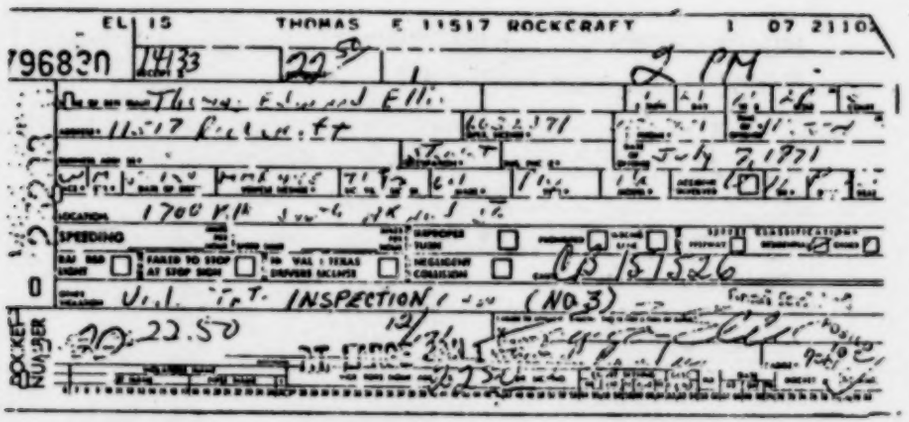
PROPERTY RELEASE
1. AMOUNT TO
PRISONER DATE | SIGN TIME | APPROVED BY
2. AMOUNT TO
PRISONER DATE | SIGN TIME | APPROVED BY

PRISONER'S ACTIVITY REPORT

POLICE DEPARTMENT
CITY OF DALLAS

Love, Robert Dennis	72-03164 nkb	JC 5136
5225 Belmont	cn22	
SMU	12-3-49	
7000 Pemberton	1-18 2am	52.50 CB151525
JT Carey 2448		12 PM
Loitering(under susp circ)		
cash bond		12.50 pd 243757
		2-24-72

Ellis, Thomas E	72-03163 nkb	JC 5078
11517 Rochcraft	wz21	
Westfield College	5-1-50	
7000 Pemberton	1-18 2am	52.50 CB151527
JT Carey 2448		12 PM
Loitering (under susp circ)		
cash bond		12.50 pd 243756
		2-24-72



Affidavit of Robert D. Love

STATE OF TEXAS,
COUNTY OF DALLAS:

Before me, the undersigned authority, on this day personally appeared Robert D. Love, who being first duly sworn, did on his oath depose and say as follows:

My name is Robert D. Love. I am a resident of the City of Dallas, Texas. I am over the age of twenty-one years, and I am otherwise competent to make this Affidavit.

I was born on December 3, 1949. I am a member of the Negro race. I reside at 5225 Belmont, Apartment 136 in Dallas. I am a graduate student in the School of Music at Southern Methodist University in Dallas.

This Affidavit relates to my arrest on January 18th, 1972, for "loitering". At the time of that arrest, I was accompanied by a friend, Tom E. Ellis, also a resident of Dallas, Texas, who is a member of the Caucasian race.

Between the hours of 11:30 o'clock p.m. and 12:30 o'clock a.m., on the night of January 17-18, 1972, my friend, Tom Ellis, and I left the home of mutual friends who live in the 5700 block of Goodwin Street, also in Dallas. Earlier in the day on January 17th, 1972, I had accompanied these mutual friends as they looked at apartments and houses in the area east of Hillcrest Avenue, in North Dallas. This was near the location where I was subsequently arrested.

Upon leaving the home of our friends, about midnight, I decided to show the apartments I had seen earlier in the day to Tom Ellis, who had not been with me earlier. On the way to the neighborhood where the apartments and homes are located, we stopped at Kip's Restaurant at the corner of Greenville and Mockingbird, for something to eat.

I then drove, with Tom Ellis, to the area east of Hillcrest Avenue, and turned into the street where I had been earlier in the day with my friends. I do not recall the name of the street now, but I did recognize it that night. I was driving slowly, about 10-15 miles per hour, so that Tom and I could look at the various models and styles of homes, and talk about each.

About this time, after we had been in the area for perhaps five minutes, I noticed what appeared to be a police car following us. This car followed us all around the area while I continued to show the various homes and apartments to Tom. Upon turning a corner, however, I saw that the car following us was not a Dallas Police Department vehicle, but a "Neighborhood Patrol" car.

As we started down another street, I saw a number of police cars and Neighborhood Patrol cars at the end of the block. One of the police cars was displaying flashing red lights. The end of the street was a "T" intersection, and we were approaching the cross-piece, and obviously had to turn either left or right. I turned left at the intersection, with various police and Neighborhood Patrol cars all around my car. Not knowing what was happening, and being unsettled by the car which had been following us, I decided that the best course of action was to just stop my car and wait for a police officer to tell us what to do.

One of the Neighborhood Patrol officers and a Dallas Police Department officer approached our vehicle and began to ask us questions. I think the Dallas Police officer's name was Carey. We were asked for identification; I gave my driver's license to the officer and Tom handed his school I-D to him. The officer then asked us more questions.

The Dallas Police officer then went to his car and I heard him give our names on the radio. About five minutes later,

he came back to my car and told Tom Ellis that he would be arrested for an "alias" ticket, a traffic ticket which he allegedly had not paid. The same officer, Carey, then told us that there had been an attempted burglary in the area where we were, and asked if we knew anything about it. We both said we did not, and also told him that a Neighborhood Patrol car had been following us almost since we arrived in the vicinity.

The Dallas Police officer then asked both Tom and myself to get out of the car. We were frisked and the car was searched. The Dallas policeman told Tom to go and sit in the police car. He then told me to open the trunk of my car, which I did. He searched the trunk, but only found some rope. He turned to me, holding the rope in his hand, and asked: "Is this what you use to hang police officers?" The officer then told me to sit in my car. Some time later, another Dallas policeman arrived. He wore three inverted "V" stripes on his sleeve. He was a sergeant.

The sergeant and Officer Carey talked for awhile, then Carey came to my car and told me to move over. While Officer Carey was driving my car to the Northeast Police Substation, we talked. I asked if I was under arrest, and he said yes, for "loitering". He said Tom would be charged with that offense, also.

At the Northeast Police Substation, I was booked and fingerprinted. We posted cash bond and as we were leaving, the sergeant told us both that if he ever saw us in that part of town again, he would "make it much worse" for us next time. By the time I arrived home, it was around 5 o'clock a.m. on the morning of January 18th, 1972.

Since my arrest for loitering, I have been very nervous about being out in public places, especially at night and in areas of town where there are numerous police officers. I

worry about being seen in public with members of the Caucasian race. In some instances, I have foregone activities in public places because of my fear of being arrested again for loitering. At other times, I have gone ahead and been active in public, but not without a gnawing fear of possible arrest. Nevertheless, I still intend to be out in public in Dallas, Texas in the future. I intend to travel freely and without restraint on public streets and in public areas, despite my uncertainty as to the scope and elements of the offense called and charged as "loitering". In doing so, I am sure that I risk possible arrest for that offense.

ROBERT D. LOVE

[Jurat omitted in printing]

Respondents' Opposition to Petitioners' Application for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

[CAPTION OMITTED]

To the Honorable Judge of Said Court:

NOW COMES, the Defendants herein, in the above entitled and numbered cause, and in reply and in opposition to the Plaintiffs' Motion for Summary Judgment herein, would respectfully show unto the court the following, to-wit:

I.

The Plaintiffs have failed by their complaint, and Motion for Summary Judgment to show how the Defendants have acted in bad faith or committed any act of harassment against the Plaintiffs, TOM E. ELLIS and ROBERT D. LOVE. These necessary factual assertions have not been raised by the Plaintiffs in their complaint, and upon this basis alone, the Plaintiffs are not entitled to a favorable judgment of this Honorable Court.

II.

The Defendants would show the court that there are genuine issues of material facts to be tried in this cause. The

Plaintiffs by their complaint and brief did recognize the need to make the factual assertion that a future state prosecution of the Plaintiffs is threatened under Ordinance 31-60. The Plaintiffs even went so far as to indicate by their own brief that this Court is permitted to abstain from a trial of this cause should it find that the Plaintiffs had NOT *alleged* and *proved* a genuine threat of a future state prosecution under the subject ordinance. The Defendants herein have persistently maintained that a future prosecution of the Plaintiffs, absent any allegations and proof of a bad faith harassment by Defendants, would be highly speculative and conjectural. Should this Court decide *not* to abstain from this cause, the question of whether the Plaintiffs face a genuine threat of future prosecution under 31-60 would then become a material issue to be determined by the truth-seeking procedures of trial.

III.

Defendants assert that from the pleadings, affidavits, and papers on file herein, there are genuine issues of material fact to be determined in this cause. There are genuine issues of material facts to be tried herein that can be reached only by a trial of this case upon its merits, particularly but not exclusively, in connection with the Defendants' plea that Ordinance 31-60 is not facially un-Constitutional; that the Plaintiffs have not been subjected to a bad faith harassment by the Defendants herein; that the Plaintiffs have not been irreparable harmed.

WHEREFORE, PREMISES CONSIDERED, the Defendants respectfully pray that the Plaintiffs' Motion for Summary Judg-

ment be in all things overruled, and for all other proper orders of this honorable court.

Respectfully submitted,

N. ALEX BICKLEY
THOMAS B. THORPE
JOSEPH G. WERNER
DOUGLAS H. CONNER
Attorneys for Defendants
501 Municipal Building
Dallas, Texas 75201
748-9711, ext. 294

By DOUGLAS H. CONNER

[Certificate of Service omitted in printing]

Respondents' Motion to Dismiss

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

[CAPTION OMITTED]

To the Honorable Judge of said Court:

COMES NOW FRANK M. DYSON, N. ALEX BICKLEY, SCOTT MCDONALD, HUGH JONES and WES WISE, Defendants in the above numbered and styled cause, and move the Court to dismiss this action on the following grounds:

I.

Plaintiffs' Complaint fails to state a cause of action over which this Court has jurisdiction.

II.

Plaintiffs' Complaint fails to state a claim upon which relief can be granted against these Defendants.

III.

Defendants say further that the abstention doctrine is applicable to Plaintiffs' Complaint and asks the Court to exercise its discretion and refuse to take jurisdiction of Plaintiffs' Complaint and grant the relief sought therein.

WHEREFORE, PREMISES CONSIDERED, the Defendants pray that Plaintiffs' Complaint be dismissed for the reasons hereinabove stated and that, in the event this Motion to Dismiss is denied, the Defendants be given ten (10) days after such ruling in which to file responsive pleadings to Plaintiffs' Complaint.

Respectfully submitted,

N. ALEX BICKLEY
THOMAS B. THORPE
JOSEPH G. WERNER
DOUGLAS H. CONNER

By THOMAS B. THORPE
Attorneys for Defendants
501 Municipal Building
Dallas, Texas 75201
748-9711, ext. 294

[Certificate of Service omitted in printing]

Petitioners' Supplemental Requests for Admissions and Interrogatories

[CAPTION OMITTED]

To: MR. THOMAS B. THORPE, Esquire
Assistant City Attorney
City of Dallas
Dallas, Texas

In light of the time which has elapsed since this case was filed on April 12, 1972, plaintiff alleges that a relevant issue is the rate at which arrests are made in the City of Dallas for violation of Section 31-60 of the Revised Code of the City of Dallas, better known as the Loitering Ordinance. Plaintiff further alleges that this arrest rate will likewise be relevant should it become necessary to seek mandamus in order to obtain a judgment in this case. Therefore, plaintiff requests that the defendant, by officer or agent, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1. How many people have been arrested by officers of the Dallas Police Department for loitering as defined in Section 31-60 of the Revised Code of the City of Dallas between the dates of April 12, 1972 (the date this case was filed) and July 17, 1972 (the date motion for summary judgment was filed in this case)?

2. How many people have been arrested by officers of the Dallas Police Department for loitering as defined in

Section 31-60 of the Revised Code of the City of Dallas between the dates of July 17, 1972 (the date motion for summary judgment was filed in this case) and November 10, 1972 (the date this application is being written).

Plaintiff requests that the defendant admit the truth of the following fact:

It is currently the policy of the Dallas Police Department to make arrests for violation of Section 31-60 of the Dallas City Code—the Loitering Ordinance.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75202
Phone: 692-2599

November 10, 1972

Opinion and Order of Dismissal

[CAPTION OMITTED]

Tom E. Ellis and Robert D. Love, plaintiffs, filed this suit for redress of rights secured to them by the First and Fourteenth Amendments to the Constitution of the United States. This suit was instituted against certain officials of the City of Dallas, Texas, under 42 U. S. C. §1983.[1] Plaintiffs attack the constitutionality of an ordinance of the City of Dallas which prohibits loitering. They seek declaratory and injunctive relief.

The defendants moved the court to dismiss the case for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. Alternatively they moved the court in its discretion not take jurisdiction of this case by reason of the doctrine of abstention. The court overruled the defendants' motion to dismiss and carried the motion for abstention. In their answer defendants reurged that the complaint be dismissed. Subsequently, plaintiffs filed a motion for summary judgment.

The court has heard the arguments and considered the briefs of the parties in connection with the motion for summary judgment filed by plaintiffs and the motion for abstention filed by defendants. The court has also reconsidered the defendants' motion to dismiss which was previously denied. The court concludes that in the light of

[1] The city officials named as defendants are: Frank Dyson, chief of police; N. Alex Bickley, city attorney; Scott McDonald, city manager; Hugh Jones, clerk of the corporation court; Wes Wise, mayor.

recent decisions of the Fifth Circuit hereinafter discussed the motion to dismiss should be granted.

In dismissing this case the court does not reach plaintiffs' motion for summary judgment or defendants' motion for abstention.

The complaint states that plaintiffs were arrested in the City of Dallas on January 18, 1972, and charged with violating an ordinance against loitering.[2] Plaintiffs applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent their prosecution under this ordinance. The gravamen of the application was the constitutionality of the ordinance under which plaintiffs were charged. This application was denied and the charges pending against the plaintiffs were set for trial in the corporation court of the City of Dallas. Plaintiffs moved to dismiss the charges on the ground that the ordinance was unconstitutional. This motion was denied and plaintiffs entered pleas of nolo contendere and were convicted.

In their complaint plaintiffs contend that this anti-loitering ordinance is unconstitutional "on its face" because it (1) is vague and overly broad, providing no discernible standards of conduct, and is violative of the due process clause; (2) is violative of the equal protection clause in that it depends upon the alarm or concern of a police officer

[2] The ordinance in dispute is Section 31-60 of the revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas. It provides in part "that no person shall loiter in, on or about any public or private place when his presence is accompanied by activity or is under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property in the surrounding area." It also defines loitering as including the activities of "walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions."

as to whether the ordinance is being violated and this may vary from person to person; (3) prohibits conduct which is beyond the power of a governmental authority to make illegal; and, (4) has a "chilling effect" upon the free exercise of the rights of freedom of association and assembly and freedom of speech guaranteed by the First Amendment and has a "chilling effect" upon the fundamental right of freedom of movement. Plaintiffs do not allege any bad faith prosecutions, harassment or other unusual conduct, or threat of such in the future, by any of the defendants that has caused or will cause them to suffer irreparable injury and harm unless the relief prayed for is granted.[3]

For the purpose of ruling on defendants' motion to dismiss this court has assumed as true every factual allegation in plaintiffs' complaint and also assumes that the City of Dallas will continue to enforce the ordinance and this may subject plaintiffs to future arrest and prosecution under the ordinance.

Since plaintiffs do not allege that there are pending criminal proceedings against them, this court is faced with the issue as to the propriety of granting federal declaratory and injunctive relief against possible future criminal prosecutions under an ordinance alleged to be unconstitutional on its face when there are no allegations in the complaint of bad faith prosecutions, harassment or other unusual circumstances which would cause plaintiffs to

[3] In addition to asking this court to declare this ordinance unconstitutional, plaintiffs also ask the court to order all references to the arrests of the plaintiffs be "expunged" from police, FBI and court records and declare that if plaintiffs are ever asked if they have been arrested or convicted, they shall be entitled to answer in the negative insofar as the arrests and convictions arise from enforcement of this ordinance.

suffer irreparable injury and harm through the enforcement of the ordinance.

In *Younger* v. *Harris*, 401 U.S. 1 (1971), the Supreme Court laid to rest any question as to what was required for federal judicial relief in those instances where there was pending criminal prosecution by holding that such relief could not be granted except under extraordinary circumstances where the danger of irreparable injury was great and immediate. 401 U.S. at 45. The Court went on to hold that the existence of a "chilling effect" on First Amendment rights would not alone constitute a sufficient basis for prohibiting pending state action. However, the propriety of granting federal relief when no state criminal proceedings are pending was expressly reserved by the Supreme Court when it decided *Younger's* sibling *Samuels* v. *Mackle*, 401 U.S. 66 (1971). However, the Fifth Circuit in recent decisions has responded to this very issue.

In *Becker* v. *Thompson*, 459 F.2d 919 (5th Cir. 1972) the court held that *Younger* principles applicable to pending state criminal prosecutions are also applicable in cases seeking federal equitable relief from threatened state criminal prosecution. Later decisions of the Circuit have followed this holding. *Reed* v. *Giarrusso*, 462 F.2d 706 (5th Cir. 1972).[4] *Milner* v. *Burson*, No. 71-2853 (5th Cir., December 6, 1972). The complaint in *Reed* alleged "harassment and unlawful arrest . . . done in utter bad faith." The court noted that "the complaint . . . makes allegations

[4] In *Reed* the court was initially concerned with the standing of the plaintiffs to bring the suit since this was the basis on which the district court had dismissed the complaint. The court concluded, as this court does in the case of *sub judice*, that plaintiffs did have standing to sue since they had been arrested and alleged that they will continue to engage in the same conduct which brought about their arrests and that they fear future arrests and prosecutions.

which if proved, would entitle them to relief even under the stringent standards of *Younger.*" *Reed,* 462 F.2d at 706, 711.

A reading of these cases leads the court to conclude that before federal declaratory or injunctive relief is available in the absence of a pending criminal prosecution there must be allegations of threatened bad faith prosecution, harassment or other unusual circumstances. In addition there must be an allegation of irreparable injury and harm to one seeking federal relief.

The only allegations in the complaint in this case which approach irreparable injury are the statements that the ordinance will have a "chilling effect" on the plaintiffs' First Amendment rights and their fundamental right of freedom of movement. The fact that the enforcement of this ordinance by the defendants would have such an effect is not enough to establish irreparable harm and injury. *Younger,* 401 U.S. at 51.

The court further notes that the plaintiffs have not alleged that they exhausted the state appeal processes after they were convicted in the corporation court. The plaintiffs could have appealed and obtained a trial de novo in the Dallas County, Criminal Court of Appeals. *Tex. Code Crim. Proc. Ann.* art. 44.17 (1965). Had they been convicted and fined in excess of $100.00, they could have appealed to the Texas Court of Criminal Appeals, the highest criminal appellate court in the State of Texas. *Tex. Code Crim. Proc. Ann.* art. 4.03 (1965). Had they been convicted and fined less than $100.00, plaintiffs would have exhausted their state remedies at that point.[5]

[5] At this stage plaintiffs had the right to appeal directly to the Supreme Court of the United States. 28 U.S.C. §1257.

For the reasons set forth above it is the opinion of the court that the defendants' motion to dismiss should be granted.

It is so ORDERED and this case is dismissed with all costs taxed against plaintiffs.

Dated this 13th day of December, 1972.

R. Wm. HILL
United States District Judge

Respondents' Answers to Request for Admission and Interrogatories

[CAPTION OMITTED]

COMES NOW the undersigned attorney for Defendants herein and makes the following responses to Request for Interrogatories and Admission previously filed herein on November 10, 1972, by Plaintiffs:

1. During the entire months of April, May, June and July, 1972, an average of 2.47 persons were arrested per day for the offense of loitering by officers of the Dallas Police Department.

2. During the entire months of August, September and October, 1972, an average of 2.25 persons were arrested per day for the offense of loitering by officers of the Dallas Police Department.

Request for Admission—ADMITTED.

This is to certify to the best of my knowledge and belief that the above and foregoing answers are true and correct.

THOMAS B. THORPE
Attorney for Defendants
Attorney for Defendants

[Verification omitted in printing]

Notice of Appeal to the United States Court of Appeals for the Fifth Circuit

[CAPTION OMITTED]

Notice is hereby given that TOM E. ELLIS and ROBERT D. LOVE, Plaintiffs, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order of Dismissal entered in this action on December 13, 1972.

Respectfully submitted,

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone: 692-2599

Order of Summary Affirmance

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1190

Summary Calendar*

TOM E. ELLIS and ROBERT D. LOVE,

Plaintiffs-Appellants,

—versus—

FRANK M. DYSON, Individually and in his capacity as Chief of Police of the City of Dallas, Texas, *et al.*, etc.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(April 16, 1973)

Before BELL, GODBOLD and INGRAHAM, *Circuit Judges.*

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.